

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JON KINNE,

Plaintiff,

-vs-

OTHELLO COMMUNITY HOSPITAL,
ADAMS COUNTY PUBLIC HOSPITAL
DISTRICT NO. 3, and HARRY
GELLER, in his individual
capacity,

Defendants.

NO. CV-09-0115-LRS

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendants' Motion for Summary Judgment (Ct. Rec. 22). This action arises out of the employment and termination of Plaintiff Kinne who was the Chief Financial Officer for approximately six months at Defendant Othello Community Hospital. Kinne alleges claims under 42 U.S.C. §1983 asserting he has been deprived of his right to privacy and freedom of association; wrongful discharge in violation of public policy; retaliatory discharge in violation of RCW 49.60.210; and breach of promise of specific treatment in specific circumstances. The

1 Court heard oral argument on January 21, 2010 and took the motion under
2 advisement.

3 **I. FACTS**

4 The following facts are undisputed, unless indicated otherwise.

5 Plaintiff Kinne was hired by Defendant Hospital as its Chief Financial
6 Officer on October 30, 2006, and was an at-will employee. As the CFO,
7 Kinne's main responsibilities included the overall finances of the
8 Hospital, overseeing incoming cash, overseeing the business office, and
9 analyzing contractual discounts. Kinne supervised 6 people who worked in
10 the Hospital's Business Office, including the Business Office Manager,
11 Diana Villarreal, who reported directly to Kinne. At the start of his
12 employment, Kinne received a copy of the Hospital's Employee Handbook.

13 The Employee Handbook, in its Introduction Policy, disclaims all
14 contractual intent with respect to its policies. The first page of the
15 handbook states, in pertinent part:

16 This handbook contains general statements of Adams
17 County Public Hospital District No.3, operating as
18 Othello Community Hospital ("OCH"), policy for your
19 information ... as we are sure you understand, we must
20 be able to respond flexibly to changing circumstances
21 as they arise. **Because of this, our policies are simply
22 guidelines, not promises of specific treatment in
23 specific situations.** [Emphasis original.] Our policies
24 and practices, including the compensation and benefits
25 we provide, are subject to change in content and
application without prior notice, at our discretion.
All decisions regarding the application or
interpretation of our policies and practices are also
in our discretion. This applies to all of our policies
and practices, whether formal or informal, and whether
or not contained in this handbook. Nothing in this
handbook is intended to be a contract limiting OCH's
discretion to act as it deems appropriate in any given
situation.

26 Ct. Rec. 23, ¶6.

1 The Hospital's Employee Handbook also contained a policy titled:
2 "Harassment, Including Sexual Harassment," which prohibited all forms of
3 harassment. A part of that policy states, as follows:

4 Because of the potential for miscommunication,
5 misunderstandings and conflicts of interest, a
6 supervisor who is considering dating someone he or she
7 directly or indirectly supervises must first notify the
8 Director of Human Resources. OCH reserves the right to
9 take steps in those situations intended to ensure that
10 the relationship is voluntary, that favoritism is
avoided and that OCH's interests are otherwise
protected. This policy applies to all employees who
have the authority or the practical power to supervise,
appoint, remove, or discipline another employee or who
are responsible for auditing the work of another
employee.

11 Ct. Rec. 23, ¶9.

12 Plaintiff stated at his deposition that he believed it to be important
13 that the Hospital have such a policy because it is necessary for the
14 protection of both the employees and employers. Kinne agreed that such
15 a policy is necessary and important in order to avoid sexual harassment,
16 favoritism in hiring, supervision, and delegation of duties. Kinne also
17 admits that having such a policy is important to avoid misunderstandings,
18 miscommunications, and conflicts of interests. Additionally, Plaintiff
19 does not contend that the Hospital was precluded from withholding consent
20 to the dating relationship while either Plaintiff or Ms. Villarreal were
21 employed in the same office.

22 Harry Geller has been the Chief Executive Officer at Othello
23 Community Hospital since December 2000. Mr. Geller counseled Kinne
24 regarding underperforming in his job responsibilities on several
25 occasions. Additionally, in early March 2007, Mr. Geller met with Kinne
26 to discuss concerns of favoritism raised by staff members of the business

1 office. During that meeting, Mr. Kinne was counseled to not interrupt
2 staff excessively; not to unnecessarily interrupt staff for tasks which
3 Kinne should be performing himself; to prioritize his tasks better; to
4 appreciate the core tasks that must be performed by subordinates in the
5 business office, and to respect the deadlines by which those core tasks
6 were to be completed. Mr. Geller viewed Kinne's behaviors as a pattern
7 of inadequate management. Ct. Rec. 23, ¶¶12-14.

8 On March 19, 2007, Mr. Geller directed Kinne to re-do the
9 financial statements to more accurately reflect the Hospital's financial
10 condition and to strike flippant comments made by Kinne in a document
11 associated with the financial statements, after the documents had gone
12 out to the Hospital's Board of Commissioners. On multiple occasions, Mr.
13 Geller spoke with Kinne about improving his contractual discount analysis
14 and the importance of that job responsibility. Ct. Rec. 23, ¶¶15-17.

15 On April 11, 2007, Mr. Kinne asked Mr. Geller for permission to date
16 Diana Villarreal, the Business Office Manager that reported directly to
17 Kinne. On April 12, 2007, Mr. Geller met with Kinne and advised him that
18 for his protection, Diana Villarreal should also submit a voluntary
19 request to date Kinne. On April 16, 2007, Mr. Geller met with Kinne and
20 provided Kinne with a written Memorandum withholding the Hospital's
21 permission for Kinne to date Diana Villarreal so long as Kinne was an
22 employee of the Hospital. Permission was withheld, in part, because the
23 Hospital had already received complaints of favoritism from employees in
24 the business office. Ct. Rec. 23, ¶¶18-19. On April 16, 2007, Geller
25 also met with Diana Villarreal and provided her with a written Memorandum
26 withholding the Hospital's permission for her to date Kinne so long as

1 she was an employee of the Hospital. Permission was withheld because of
2 departmental operations issues. Kinne never discussed with Geller the
3 topic of marriage between Kinne and Villarreal. Ct. Rec. 23, ¶¶20-21.

4 On April 20, 2007, Geller had another meeting with Kinne to again
5 discuss Kinne's need to improve his contractual discount analysis and
6 the need to correct financial statements. On April 26, 2007, Kinne
7 informed Mr. Geller and the Hospital's Human Resources Director,
8 Cheryl Olson, that Kinne received a reference call on April 25, 2007
9 from a potential employer concerning Diana Villarreal. On April 27,
10 2007, Diana Villarreal submitted her resignation as the Business
11 Office Manager for the Hospital. Kinne did not appear, at meetings
12 held on April 27, 2007 and again on April 30, 2007, to be concerned
13 for his department or cooperative regarding finding a replacement for
14 Ms. Villarreal, according to Ms. Olson and Mr. Geller. Ct. Rec. 23,
15 ¶¶22-27. In addition to other performance issues, this perceived non-
16 cooperativeness was the final straw which led to Kinne's termination
17 by the Hospital on May 3, 2007. Ct. Rec. 23, ¶28.

18 According to Kinne, he and Diana Villarreal did not start dating
19 until after he was terminated on May 3, 2007, however, they talked
20 about getting married prior to May 3, 2007. Kinne cannot recall the
21 date on which he proposed, but they were married on August 4, 2007.
22 Mr. Kinne admits that his only alleged opposition activity was to
23 follow the Hospital's policy to make sure there was no sexual
24 harassment on the part of himself or Ms. Villarreal. Based on Kinne's
25 own speculation and perceptions, Kinne believes he was terminated
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1 because he asked permission to date a subordinate, direct report
2 employee, Ms. Villarreal. Ct. Rec. 23, ¶¶31-34.

3 **II. ANALYSIS**

4 **A. Burden of Proof on Summary Judgment**

5 The summary judgment procedure is a method for promptly disposing
6 of actions. See Fed. R. Civ. Proc. 56. The judgment sought will be
7 granted if "there is no genuine issue as to any material fact and []
8 the moving party is entitled to judgment as a matter of law." Fed. R.
9 Civ. Proc 56(c). "[A] moving party without the ultimate burden of
10 persuasion at trial [] may carry its initial burden of production by
11 either of two methods. The moving party may produce evidence negating
12 an essential element of the nonmoving party's case, or, after suitable
13 discovery, the moving party may show that the nonmoving party does not
14 have enough evidence of an essential element of its claim or defense
15 to carry its ultimate burden of persuasion at trial." *Nissan Fire &*
16 *Marine Ins. Co., Ltd., v. Fritz Companies*, 210 F.3d 1099, 1102 (9th
17 Cir.2000). If the movant meets its burden, the nonmoving party must
18 come forward with specific facts demonstrating a genuine factual issue
19 for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,
20 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

21 If the nonmoving party fails to make a showing sufficient to
22 establish the existence of an element essential to that party's case,
23 and on which that party will bear the burden of proof at trial, "the
24 moving party is entitled to a judgment as a matter of law." *Celotex*
25 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265
26 (1986). In opposing summary judgment, the nonmoving party may not rest

1 on his pleadings. He "must produce at least some 'significant
2 probative evidence tending to support the complaint.'" *T.W. Elec.*
3 *Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th
4 Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S.
5 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

6 The Court does not make credibility determinations with respect to
7 evidence offered, and is required to draw all inferences in the light
8 most favorable to the non-moving party. See *T.W. Elec. Serv., Inc.*,
9 809 F.2d at 630-31 (citing *Matsushita*, 475 U.S. at 587). Summary
10 judgment is therefore not appropriate "where contradictory inferences
11 may reasonably be drawn from undisputed evidentiary facts...."
12 *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335
13 (9th Cir.1980).

14 **B. Civil Rights Violations Under 42 U.S.C. 1983**

15 **1. Rights Not Substantially Burdened/Rational Basis for Policy**

16 Plaintiff alleges that the Hospital Administrator, Defendant Harry
17 Geller, deprived him of his right of privacy and right to freedom of
18 association by suffering retaliation for his relationship with
19 Villarreal. Plaintiff argues, citing an Eleventh Circuit case,¹ that
20 his relationship with Villarreal was protected by the right of
21 intimate association, a type of association protected by the First
22 Amendment's freedom of association. Further, Plaintiff argues, that
23 making an adverse decision against an employee due to his personal
24 activities and associations may violate his right to privacy. Ct.

26 ¹*Wilson v. Taylor*, 733 F.2d 1539, 1544 (11th Cir.1984).

1 Rec. 29, at 17. Finally, Plaintiff asserts that causation is satisfied
2 based on the facts showing that upon Villarreal's notice of
3 resignation, Defendant Geller reflexively terminated Kinne. *Id.*

4 Defendants argue that while Kinne had a right to freedom of
5 association and privacy, those rights were not violated nor
6 substantially burdened because of the Hospital's policy, for which the
7 Hospital had a rational basis. The provision of the policy at issue
8 in this case only applies to relationships in which a supervisor
9 desired to date someone he or she directly supervised. There were
10 only 6 people who reported directly to Kinne. Thus, the impact was
11 not upon a significant number of individuals.

12 Where fundamental rights are not substantially burdened, the
13 regulation or policy will be upheld where there is a rational basis
14 for its enactment under *Parsons v. County of Del Norte*, 728 F.2d 1234,
15 1237 (9th Cir.1994). Kinne admits that the Hospital had rational
16 reasons for having such a policy in place. Specifically, Kinne admits
17 such a policy is necessary and important in the avoidance of sexual
18 harassment, favoritism in hiring, supervision and delegation of
19 duties, as well as avoidance of misunderstandings, miscommunications
20 and conflicts of interest. Ct. Rec. 32, at 4.

21 Based on the evidence, Defendant Hospital withheld permission from
22 Plaintiff to date Ms. Villarreal due to the fact that the Hospital had
23 already received prior complaints of favoritism from others in the
24 business office. It cannot be said that the policy substantially
25 burdened Kinne's rights to association and privacy. And Plaintiff
26 does not argue that the policy at issue should not be upheld or that

1 there is not a rational basis for its existence. The facts indicate
2 that the Defendant Hospital withheld permission for Plaintiff to date
3 Villerreal due to the fact the Hospital had received prior complaints
4 of favoritism from others in the business office. The Court finds
5 that Plaintiff's constitutional rights were not deprived under the
6 unique facts of this case.

7 **2. Qualified Immunity**

8 Defendants state that whether an official, such as Defendant Geller
9 in this case, may prevail on a qualified immunity defense depends upon
10 the objective reasonableness of the conduct as measured by reference
11 to clearly established law. Defendants argue that Geller's conduct in
12 withholding permission from Kinne to date Villerreal was objectively
13 reasonable under the facts of this case. Prior to Kinne requesting
14 permission to date Villerreal, the Hospital had already received
15 complaints of favoritism and disparate treatment from other employees
16 who worked in the business office. Defendants conclude that Geller has
17 qualified immunity which shields him from liability on the alleged
18 claims.

19 Plaintiff argues that the right of intimate association has been
20 apparent to state actors well before 1984 and has applied to dating
21 relationships since 1984. Plaintiff contends that Defendant Geller
22 should have recognized that he would violate the right when allegedly
23 retaliating against Kinne for his association and for the resignation
24 of Villerreal.

25 The Court above found that Plaintiff's constitutional rights were
26 not violated. Therefore, it is unnecessary to analyze the qualified

1 immunity defense with respect to Defendant Geller. The Court
2 dismisses the 42 U.S.C. §1983 cause of action against all Defendants.

3 **C. Discharge in Violation of Public Policy**

4 Defendant argues that Kine cannot establish a prima facie case of
5 wrongful discharge in violation of public policy. Defendants explain
6 that although Plaintiff attempts to couch his request to receive
7 permission to date a subordinate employee as opposition to sexual
8 harassment, his conduct (seeking permission to date) is not covered as
9 a matter of public policy. Defendants further assert that the public
10 policy must be clear. As part of the requirement that the public
11 policy mandate be clear. Washington courts also require that the
12 employee seek to further the public good, not merely private or
13 proprietary interests. *Farnan v. Crista Ministries*, 116 Wn.2d 659,
14 669 (1991). Further, Defendants explain citing *Thompson v. St. Regis*
15 *Paper Co.*, 102 Wn.2d 219, 226 (1984), an employer can discharge
16 employees for no cause, good cause or even cause morally wrong without
17 fear of liability.

18 In this case, Defendants assert that the only interest Plaintiff
19 was trying to protect was simply his own individual, private interest
20 and not those of the public in general. Therefore, Defendants request
21 that Kinne's claim for wrongful discharge in violation of public
22 policy be dismissed.

23 Plaintiff, on the other hand, contends that a clear public policy
24 existed here, which is prohibiting sexual harassment in the state of
25 Washington. Plaintiff states he recognized the hospital's sexual
26 harassment policy in furthering this public policy. Plaintiff

1 concludes his discharge jeopardizes this public policy. The Court
2 disagrees for the reasons that follow.

3 A claim for wrongful discharge in violation of public policy is
4 established by showing (1) a clear public policy (clarity element);
5 (2) the public policy will be jeopardized by the discharge (jeopardy
6 element); (3) the plaintiff's protected action caused the discharge
7 (causation element); and (4) the defendant cannot show an overriding
8 justification for the dismissal. (absence of justification element).
9 *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)
10 *citing Gardner v. Loomis Armored, Inc.* 128 Wn.2d 931 (1996). The
11 parties agree on the elements that are required for this intentional
12 tort. The parties, however, do not agree on application of the facts
13 to the elements.

14 A plaintiff must prove all four elements of the wrongful discharge
15 in violation of public policy. The Court finds that there is no clear
16 mandate of public policy (clarity element) contravened under the facts
17 of the instant case. Finding no clear mandate of public policy, the
18 Court need not discuss the jeopardy element of a prima facie case.
19 Additionally, Plaintiff cannot show there was not an overriding
20 justification for his dismissal, i.e., performance, complaints of
21 favoritism from others in the Hospital Business Office, non-
22 cooperativeness of Plaintiff in replacement of Villerreal, and lack of
23 trust in Plaintiff's abilities and judgment. The Court dismisses this
24 cause of action against all Defendants.

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1 **D. Retaliatory Discharge in Violation of RCW 49.60.210**

2 As the parties agree, the employee must initially establish a *prima*
3 *facie* case of retaliation in order to satisfy a claim for retaliatory
4 discharge in violation of RCW 49.60.210. *Milligan v. Thompson*, 110
5 Wn.App. 628, 638 (2002). Defendants argue that Plaintiff has failed
6 to establish a *prima facie* case. Even if Plaintiff could meet his
7 burden, Defendants state that they have produced admissible evidence
8 of a legitimate, non-discriminatory, non-retaliatory reason for the
9 discharge.

10 Plaintiff argues that he satisfies all three elements of a required
11 *prima facie* case and asserts that Defendant Hospital's reasons for
12 discharge are pre-textual. In support of this argument, Plaintiff
13 states that the timing of his discharge provides evidence of a
14 retaliatory motive.

15 The Court finds that while Plaintiff believes he was a victim of
16 retaliation, Kinne does not set forth any evidence establishing a
17 *prima facie* case of retaliation. Plaintiff merely speculates that the
18 timing of his discharge provides evidence establishing a *prima facie*
19 case.

20 In order to satisfy a claim for retaliatory discharge in violation
21 of RCW 49.60.210, the plaintiff must show that (1) he had engaged in a
22 protected activity, (2) that he suffered an adverse employment action
23 against him, and (3) that retaliation was a substantial factor behind
24 the adverse employment action. *Kahn v. Salerno*, 90 Wn.App. 110, 129,
25 951 P.2d 321, rev. denied, 136 Wn.2d 1016 (1998). Plaintiff
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1 cannot show, without speculation, that retaliation was a substantial
2 factor, or a factor at all, behind his discharge. Plaintiff has not
3 provided competent evidence of pretext to support his allegation that
4 he was terminated for asking permission to date a subordinate
5 employee. Pretext cannot be established by conclusory statements of a
6 plaintiff who feels that he has been discriminated against. And, as
7 noted above, in the absence of evidence of pretext, Kinne was an "at
8 will" employee whose employment could be terminated with or without
9 cause.

10 Defendants, however, have produced evidence of performance issues
11 during Kinne's informal 6-month probationary period. Ct. Rec. 32, at
12 9-10. With evidence that the Hospital had legitimate,
13 nondiscriminatory and non-retaliatory reasons to terminate Kinne's at-
14 will employment, Plaintiff cannot satisfy the element that alleged
15 retaliation was a substantial factor behind his discharge. For these
16 reasons, the Court dismisses this claim against all Defendants.

17 **E. Breach of Promise**

18 Plaintiff asserts that the Hospital breached a promise of specific
19 treatment in specific circumstances, contained in the Hospital's
20 Employee Handbook. Plaintiff states that the primary policy he relied
21 upon was that portion of the Hospital's harassment policy concerning
22 no retaliation against anyone or makes a good-faith complaint or who
23 cooperates in good faith investigation. Ct. Rec. 24, at 24.
24 Plaintiff, in his responsive memoranda, argues there is an issue of
25 fact as to whether the Hospital's disclaimer is applicable to the
26 equal employment policies contained in the Handbook.

1 Defendants argue that Plaintiff did not have a right to rely on any
2 promises of specific treatment based on the disclaimer on page 1 of
3 the Handbook. In addition to being on the first page, conspicuous and
4 in bold font, the Hospital's policy included the statement that
5 **"Because of this, our policies are simply guidelines, not promises of**
6 **specific treatment in specific situations."**

7 The Court has reviewed the parties' arguments. The interpretation
8 of a writing is a question of law for the Court. Based upon the
9 Hospital's Introduction Policy in its Employee Handbook, the Court
10 finds that Plaintiff could not have had any reasonable expectation
11 that the Hospital's Handbook made any promises of specific treatment
12 in specific situations or to justifiably rely on any other provisions
13 in the Handbook. The policy states, in pertinent part:

14 This handbook contains general statements of Adams
15 County Public Hospital District No. 3, operating as
16 Othello community Hospital ("OCH"), policy for your
17 information . . . As we are sure you understand, we
18 must be able to respond flexibly to changing
19 circumstances as they arise. **Because of this, our**
20 **policies are simply guidelines, not promises of**
21 **specific treatment in specific situations.** Our
22 policies and practices, including the compensation
23 and benefits we provide, are subject to change in
24 content and application without prior notice, at our
25 discretion. All decisions regarding the application
26 or interpretation of our policies and practices are
also in our discretion. This applies to all of our
policies and practices, whether formal or informal,
and whether or not contained in this handbook.
Nothing in this handbook is intended to be a contract
limiting OCH's discretion to act as it deems
appropriate in any given situation.

24 Ct. Rec. 24, at 27, Exh. 3.

25 The Court further finds that, as a matter of law, the Handbook does
26 not provide a promise of specific treatment in specific circumstances

1 when the Handbook gives the employer discretion in applying the
2 policies. *Sharpe v. AT&T Co.*, 66 F.3d 1045 (9th Cir.1995). Based on
3 the foregoing, Plaintiff's claim of breach of promise is dismissed
4 against all Defendants.

5 **III. CONCLUSION**

6 Based upon the reasons and authorities cited above, **IT IS HEREBY**
7 **ORDERED:**

8 1. Defendants' Motion for Summary Judgment (Ct. Rec. 22) is
9 **GRANTED.**

10 2. The District Court Executive is directed to enter this Order
11 and shall forward copies to counsel. The Clerk shall enter judgment
12 consistent with this order and close the file.

13 DATED this 4th day of February, 2010.

14 ***s/Lonny R. Suko***

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16 LONNY R. SUKO
17 Chief United States District Judge
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